No. 9049

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee,

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

WAYNE A. BARCLAY,
Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Twin Falls, Idaho;

RICHARDS & HAGA,
Boise, Idaho,

Attorneys for Appellant.

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STATEMENT

We are confused by the celerity with which counsel for appellee shift their arguments and shuffle the facts.

Counsel emphasize repeatedly the equities of appellee. They seek to leave the impression that someone other than appellee was responsible for the enterprise which, they now say, has ended in disaster and to the great misfortune of appellee and its bondholders.

Appellee Was the Promoting Company

Appellee selected the lands to be reclaimed and fixed the terms upon which the water rights were sold to settlers. Section 41-1703 Idaho Code Annotated provides for the initiation of Carey Act projects. This section provides that:

> "Any * * * incorporated company * * * desiring to construct ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file a request for the selection, on behalf) of the state, * * * of the land to be reclaimed, designating said land by legal subdivisions.

> "This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected."

Section 41-1707 provides:

> "In case of approval, the department shall file in the local land office a request for the withdrawal of the land *described in said proposal.*"

And Section 41-1709 I.C.A. provides:

> "Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Department of Reclamation to enter into a contract *with the parties submitting the proposal,* * * *"

Thus, the lands which appellee now contends are worthless and can not be resold *were selected by appellee.* It recommended to the State of Idaho that such lands be segregated from the public domain by the United States Government for reclamation by appellee under the Carey Act.

The state contract (R. 184) provided that appellee had the right to collect one-fifth of the purchase price of water rights in cash before the entryman could file on the land, and it could require that the remainder be paid in five equal annual instalments.

The default by the settler was obviously due to the following factors, all under the control of appellee:

(a) A small cash payment instead of 20% of the purchase price at the time the contract was entered into;

(b) The lands were rough and unsuited for irrigation and farming;

(c) Appellee furnished a wholly inadequate water supply.

The poor quality of the land and the wholly inadequate water supply and the adverse conditions con-

fronting the new settler were such that he chose to forfeit the small cash payment rather than carry out his contract.

Appellee therefore can not shift the responsibility for its misfortune on the State of Idaho, but it seeks by this case and by the position it now takes to shift it onto the settlers who remained on the project and who have spent approximately $2,000,000 to acquire additional water for their own lands and to improve the system so that they can make a reasonable success of an enterprise that would have been a complete failure except for the improvements which the settlers have made at their own expense and on their own account and through appellant as their operating company. In our opening brief (p. 67) we showed how appellant has expended about $669,000 for the purchase of additional water rights and for necessary improvements on the irrigation system, and counsel for appellee in their brief (bottom p. 101, top p. 102) show how the individual settlers have purchased from the American Falls Reservoir District water rights under the irrigation district plan, to the amount of 1.7 acre feet per acre, and we now add simply that this was purchased and assessed by the district against the land of the settlers, at a cost to the settlers of about $1,350,000, thus making an additional outlay of more than $2,000,000 by appellant and its stockholders to obtain the kind of irrigation system and the amount of water that appellee had agreed to provide for the consideration which it received from the settlers.

There are many irrigation projects in the West, where the irrigation company has shifted to the settlers the burden of providing for themselves an adequate water supply because the company failed to carry out the contracts which it had made when it sold the water rights, but we believe this is the first case to come before any Court in which the company

not only shifts that burden onto the settlers, but asks, under a plea for equitable relief, that the Court should also shift onto the settlers the additional burden and expense of also providing an adequate water supply and an adequate irrigation system for the lands which the company itself has acquired from settlers who gave up in despair.

We shall not further discuss the equities of appellee and its stockholders, who, counsel argue, the Court should now assume were the original bondholders who furnished the money to undertake the construction of the project before there were any tangible assets to secure the bonds. Suffice it to say, there are now no bondholders and we may safely assume that the stock has long since passed into the hands of speculators who hope to profit by the changed position which appellee has now taken since it passed from under the control of the bondholders' committee.

The Plea in Abatement

Counsel for appellee state the gist of the controversy in the very opening paragraph of their brief. They say:

> "This suit involves primarily the relative priority of a claim on the part of the bondholders of a Carey Act construction company to be reimbursed for the cost of constructing an irrigation system as against the subsequent claim of a Carey Act operating company for the cost and expense of maintaining and operating the irrigation works so constructed."

The only error in the statement is that the suit is not on the part of the "bondholders," but on the part of the company that promoted the project. Whether any bondholder is a stockholder of the company is merely a matter of conjecture and may be true one day, but not the next.

As stated by counsel for appellee, the sole question is the relative priority of the liens claimed by appellee and by appellant on the land described in Exhibit 1 to the findings of fact (R. 114-133).

Counsel also argue at length and with much emphasis that the decision rendered on February 21, 1939 (set out in full in the appendix of Appellee's brief), by District Judge Stevens, in case number 2053 from Jerome County, covers the identical questions that must be decided in the case at bar.

We agree that the sole question before Judge Stevens was the relative priority of appellant's and appellee's liens against the identical land involved in the case at bar. Reduced to its simplest form, the question is not whether appellant's lien for the maintenance charges for 1932, 1934 and 1937, is superior or paramount to appellee's so-called construction lien, but whether appellee has a lien on the lands in question under Section 41-1726 I.C.A. that is paramount and superior to liens under Section 41-1901, et seq., I.C.A., in favor of appellant on the *same lands.*

This is not a case where suits in the State and Federal Courts simply involve the construction of the same statutes and where the construction by one Court might influence the decision of the other Court. We have here two suits between the *same parties,* involving the *same lands*—each party claiming a lien paramount to the lien of the other—and involving the construction of the statutes under which the rank and dignity of the liens must be determined.

The broad question of priority of liens against the same lands is involved in both suits. Appellee's contention that the 1932, 1933, and 1934 liens are not the *identical liens* involved in the case at bar takes too narrow a view of the rule of comity and the law governing the abatement of actions; it is a feeble and

unsatisfactory answer to appellant's claim that this action should be abated until one of the State Court cases has been decided and the Idaho statutes construed by the highest Court of the State. By no other procedure can we have harmony and uniformity in the administration of the law and avoid conflicting constructions and conflicting decisions that will prove most embarrassing in the administration of all Carey Act projects, and particularly in the case of the project here involved.

It is most significant that appellee has strenuously sought to obtain a decision from this Court, before the Supreme Court of Idaho is afforded the opportunity of deciding the same questions and construing the Idaho statutes in the case recently decided by Judge Stevens. His decision was rendered on February 21 (p. vii of appendix to Appellee's Brief), and it closes with the statement:

> "Defendant's counsel are requested to prepare findings of fact, conclusions of law, and decree and serve a copy upon counsel for plaintiff at least ten days before presentation to the Court for signature."

Counsel for appellant have repeatedly urged counsel for appellee to comply with the Court's request so that appellant may promptly perfect its appeal, but up to this time (April 13), over seven weeks after that decision was rendered, the findings, conclusions, and decree have not been served on or presented to appellant or the Court.

In cases involving important state statutes, and especially where they have far-reaching effect in the everyday administration of the law, the Federal Courts have uniformly invoked the rule of comity, and in the interest of harmony have taken advantage of the

opportunity to secure the construction of the state statutes by the highest Court of the State. Under such circumstances the Federal Courts have never invoked technical rules or contentions as to their own jurisdiction, but they have proceeded under a broad view of a procedure that would avoid conflicting judgments and conflicting determinations that would embarrass the state in the administration of its statutes. In U.S. vs. Bank of New York, 296 U.S. 463, 480, 80 L. Ed. 331, 340, the Court, in discussing the practical question on which the rule of comity is based, said:

> "The statutory grant of jurisdiction to the district court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the state, and the status of those assets, may require in the proper exercise of the discretion of the Federal Court that jurisdiction should be relinquished in favor of the state administration."

This question was fully discussed in our opening brief, pp. 38 to 48. That the suits in the State Court and the Federal Court are proceedings in rem was there discussed at length and requires no further comment.

In Dennison Brick & Tile Co. vs. Chicago Trust Co., 286 Fed. 818 (C.C.A. 6), the Court said, page 821:

> "In respect of classification as to proceedings *in rem* we can see no valid distinction in principle, on the one hand, between a proceeding to enforce a lien or foreclose a mortgage, and, on the other hand to remove a lien or set aside a mortgage. Statutes of the latter character, equally with those

of the former, act directly upon the *res*, the status of the title. Nor do we find any distinction upon authority'."

That there is an identity of issues in the cases pending in the State Court and the case at bar is repeatedly emphasized by counsel for appellee. We call particular attention to counsel's enthusiastic comments on the recent decision of Judge Stevens of the State District Court (pp. 80-81 of Appellee's Brief). Under the circumstances presented by the record, the Court last acquiring jurisdiction will defer action until the final determination in the action first commenced, involving the same parties and subject matter.

Amusement Syndicate Co. vs. El Paso Land Improvement Co., 251 Fed. 345.

Appellee has referred to the fact that Judge Lee, in case number 2053 in Jerome County, recently decided by Judge Stevens to whom the case was later assigned, enjoined appellee from seeking relief in the Federal Court from the assessments levied by appellant during the year 1932, 1933, and 1934. The facts briefly stated are that appellee's original complaint in the Court below embraced the assessments levied during the years *1932* to 1937, inclusive. Case number 2053 in the District Court of Jerome County involved the assessments for 1932 only, and appellant in *that suit* filed an ancillary petition for an injunction against appellee, enjoining it from prosecuting any action in the Federal Court involving the same assessment that was involved in case number 2053 and other actions pending in the State Courts for Jerome and Gooding counties. The application for the injunction being purely ancillary to the suit in which it was filed, Judge Lee presumably doubted his jurisdiction to extend the injunction order

so as to cover the assessments levied during 1935 to 1937, inclusive, especially because the suits on the 1935 assessment for Jerome and Gooding counties were filed after the filing of appellee's suit in the Federal Court. Judge Lee accordingly went as far as it was thought his jurisdiction could possibly permit him to go in an ancillary matter.

Appellee thereupon amended its complaint in the Federal Court and dismissed therefrom all reference to the assessments for the years 1932 to 1934, inclusive, and appellant filed its plea in abatement as to the assessments for 1935 to 1937, inclusive. It is unfair to the State Court for appellee to draw the conclusion that the State Court recognized the prior jurisdiction of the Federal Court, for the assessments for 1935 to 1937, inclusive, or that the proceedings in the Federal Court did not involve the same subject matter as is involved in the cases in the State Court. The proceedings in the State Court were restricted by the fact that the petition was an ancillary proceeding, but even at that we believe the State Court could, with perfect priority, have enjoined appellee from proceeding with its case in the Federal Court. However, it was thought that the proper procedure to reach the matter under the rule of comity was by plea in abatement in the Federal Court, and we submit that the Trial Court committed error in not abating the action, or deferring further proceedings therein until the final determination of the suit in the State Court.

The Actions Commenced by Appellant in the State Court for Foreclosure of the 1935 and 1936 Assessments Were Commenced in a Proper Court and the Actions Were Pending at the Time of the Trial of the Instant Case.

Appellee, pp. 92 to 99 of its brief, argues that the suits in the State Court for the foreclosure of the assessments for 1935 and 1936 were not commenced

in *a proper court.* This subject was discussed at some length in our opening brief, pp. 29-30 and 73-78, and we shall not repeat what was there said. It is sufficient to say that appellee has cited no authority holding in substance or effect that, where there is concurrent jurisdiction in the State and Federal Courts over liens, the Court first acquiring jurisdiction can go farther than to enjoin the litigant from prosecuting his action in the other jurisdiction, pending a final determination of the cause in the Court having first acquired jurisdiction.

In the case at bar appellee brought a suit to quiet title on the ground that its lien was exempt from assessments levied by appellant under the state statutes authorizing such assessments. Within a short time thereafter it became necessary for appellant, in order to preserve its rights under the state statutes, to commence an action for the foreclosure of its liens for the assessments of 1935 and 1936. It brought its suits in the District Court of the proper county. Both the constitution and the statutes of the state confer upon that Court general jurisdiction of all cases. That the commencement of such foreclosure suits protected appellant's rights seems too clear for argument.

The evidence offered as to the commencement of such suits should have been admitted by the Trial Court. If the suits in the State Court interfered with the suit in the Federal Court, the proper procedure would have been for appellee to have filed a plea in abatement in the State Court, or requested an injunction order in the Federal Court against appellant, proceeding with the cases in the State Court. For the Federal Court to hold that the State Court was without jurisdiction was clearly error.

Boston Acme Mines Corp. vs.Salina Canyon Coal Co., 3 Fed. (2d) 729, 735.

To hold, as did the Trial Court in this case, that the proceedings in the State District Court were a nullity, is clearly without precedent and is reversible error. Counsel's argument is not convincing and it lacks supporting authority.

Estoppel

Counsel contend that the failure of Mr. R. E. Shepherd to protest against or object to the assessments levied against appellee's lands does not support estoppel against appellee because, they say, Mr. Shepherd was general manager of appellant and was being paid by appellant for managing and directing its business; that where the general manager is an officer of two corporations, neither corporation can invoke the rule of estoppel against the other. They cite as authority for this novel proposition 14A C.J. 365, and support their contention by quoting one sentence from that text, as follows:

> "But one corporation is not liable for the acts of such officers done in the discharge of their duties toward the other corporation."

The statement is not in point and the text cites but one case in support of the statement. The case is Holder vs. Cannon Mfg. Co., 135 N.C. 392. In that case Holder had at one time been employed by the Cannon Mfg. Co., a textile company. Because of strikes and labor controversies he had apparently severed his connection with that company and entered the employ of the Gibson Mfg. Co., another textile company in the same community. The two companies had the same general officers, managers and assistant managers. In course of time Holder was discharged by an assistant manager of the Gibson Co., who was also assistant manager of the Cannon Co. Holder sued the Cannon Co. and alleged that it had

requested the Gibson Co., through the assistant manager, to discharge plaintiff. Holder obtained judgment against the Cannon Co., and this was affirmed on appeal, apparently because all the evidence had been admitted without objection. In the course of the opinion the Court made some statement which is the basis for the sentence in Corpus Juris quoted by the appellee.

Mr. Shepherd was the general manager of appellee and the representative of the bondholders; he was the only person on the project authorized to speak for all the interests merged into appellee and which appellee now claims to represent. By common consent and the approval of all parties he was also general manager of appellant, in which appellee and the bondholders' committee were large stockholders. This is not a case where an agent of two principals, or an officer of two corporations handled transactions or negotiated contracts between the principals, or the corporations involving conflicting interests. Appellant's stockholders and directors, upon the advice and approval of Mr. Shepherd and at his request, made expensive improvements on the irrigation system and purchased additional water rights for the benefit of all stockholders, including appellee and the bondholders' committee. These dealings involved no adverse or conflicting interests. Mr. Shepherd acted in the utmost good faith and for what he considered the best interests of all parties. However, as the representative of appellee and the bondholders' committee and as their manager and spokesman, he made no protest against assessments being levied against their lands for the payment of such improvements and additional water rights.

Obviously if the action which appellant was taking in the levying of assessments was contrary to the interests of the other parties which Mr. Shepherd rep-

resented, it was his duty to so advise appellant. On the contrary he acquiesced in the actions of appellant and so did appellee and the bondholders' committee, for they paid all assessments levied for upwards of 25 years. It was Mr. Shepherd's duty to think and act for the bondholders' committee and for appellee as well as for appellant. There was no one else on the project to whom notice of appellant's actions could be given. There was no one on the project but Mr. Shepherd who could speak with authority as to what appellee and the bondholders' committee approved or disapproved.

The fact that Mr. Shepherd was manager of appellant gave him advance information as to the actions which appellant was about to take. That information, in course of time, would have been conveyed to appellee and the bondholders' committee. The assessments were levied and they were paid, not only with the approval of their general manager but upon the advice of their general counsel, Judge E. A. Walters (R. 238-239), who outlined clearly in his letter to Mr. Hurlebaus, secretary of appellant, the basis upon which appellee would pay assessments for maintenance and operation charges levied by appellant.

The opinion of this Court was rendered on May 25, 1925, and Judge Walters' letter was dated October 30, 1925, or more than five months after the opinion was rendered. Judge Walters' opinion involved a specific tract of land, which is also involved in the case at bar. It stated definitely that from the date of the transfer of the legal title from the settler to appellee "the prior lien of the Carey Act contract no longer exists and the lien of the canal company becomes paramount" (R. 239-240). That construction was acquiesced in by appellee and by the bondholders' committee and thereafter followed. Appellee never questioned the correctness of that construction of the

statute until the commencement of this action.

Counsel have shifted their position since the trial of the case as to the grounds on which the letter should be excluded. The argument now made is not applicable to the case. Judge Walters was an *agent* of the bondholders' committee—he was the committee's legal advisor. He was also the legal advisor of appellee and of the various interests which it now represents. *He was the authorized agent of these interests, charged with the duty of guiding and directing them in their legal matters,* and that is why appellant requested him to outline appellee's position on the payment of the assessments, in view of the decision of this Court in the Portneuf-Marsh case.

It matters not whether Judge Walters' opinion was right or wrong. That is beside the case. On this matter he was the spokesman for appellee and the bondholders' committee. They approved his advice and they paid their assessments according to the formula which he outlined. They confirmed his construction of the statutes.

The action of appellee and the bondholders' committee in paying the assessments after this opinion of Judge Walters contradicts conclusively the argument of counsel for appellee that the payments were merely voluntary contributions to appellant's expenses and were not based upon any concurrence in appellant's construction of the statutes under which the assessments were levied.

The rule of estoppel applies with all its force under the circumstances stated.

Counsel repeatedly state that appellant claims an "equitable lien." We claim no such lien. We claim a lien under the statute, and that appellee is estopped to question the construction of the statute for the reasons heretofore stated and discussed in our opening brief (pp. 28-29, 65-72).

Decision of Judge Stevens in the State Court Case, No. 2053

Counsel have added as an appendix to their brief the decision recently rendered by Judge Stevens in the State District Court case which was assigned to him after Judge Lee issued the injunction against appellee, heretofore referred to (R. 213).

We have the highest regard for Judge Stevens, but he was handicapped by the press of other business and by limited experience with the Carey Act statutes and Carey Act development. What we consider as errors in his opinion are due entirely to the confusion created by the specious argument of counsel for the appellee.

Counsel quote (pp. 81-83, their brief) at length from Judge Stevens' opinion and they refer to it as being "particularly devastating to appellant's contention on this appeal."

Judge Stevens uses the following illustration in his opinion (pp. 81-82, Appellee's Brief): If an entryman should fail to comply with the law *before acquiring title to the land,* the construction company, on foreclosing its lien upon the water, would be compelled to resell the water rights to another entryman on the same land; that in such case the state contract would control the construction company in the sale of the water and the stock would be exempt from assessment, pending a resale thereof to another entryman. Judge Stevens then applies that principle to a case where the company forecloses *after title has been acquired* by the entryman and the opinion concludes that if the company becomes the owner of the land it must hold the land and water rights subject to resale to another entryman, as in the case first referred to, where the entryman had not acquired title to the land. The conclusion thus drawn is directly contrary to the state statutes.

We know of no case where any company has ever foreclosed a water contract on land where the entryman had not acquired title. In such instances the entry itself is cancelled either at the instance of the state or the construction company, or another entryman who files a contest against the original entryman, proves noncompliance with the law, and obtains a cancellation by the state of the original entry. The original sale of water rights for the land is thereby automatically cancelled and the land restored as part of the unentered Carey Act land in the project. It may later be re-entered as any other Carey Act land and a new water right contract entered into with the second entryman, pursuant to the terms of the state contract.

The fallacy in Judge Stevens' argument arises from the fact that he wholly overlooked the statutes which govern foreclosure of the lien of the water contract *after* the entryman has made final proof and obtained title to the land. Section 41-1729 I.C.A. provides for a foreclosure sale upon the publication of notice of sale for a period of six weeks and requires that the land be sold to the highest bidder by the sheriff, who issues the usual certificate of sale to the purchaser.

Section 41-1730 I.C.A. provides that if the holder of the construction or water contract lien bids in the property at sheriff's sale, it can not bid more than the amount due and unpaid on the water right, plus costs of sale, etc.

Section 41-1732 provides that when the land is purchased by someone other than the lienholder, the sheriff shall pay the lienholder the amount due it out of the proceeds of sale, plus interest and costs, and the balance, if any, shall be paid to the owner of the land, as in other foreclosure sales.

Section 41-1733 provides that the owner may redeem from the foreclosure sale at any time within nine

months and, failing to do so, he has no further interest in the land and the title vests absolutely in the purchaser, except where the lienholder is the purchaser.

Section 41-1734 provides that where the lienholder is the purchaser at the foreclosure sale, if the landowner fails to redeem within nine months, then at any time within three months thereafter any other person may redeem upon paying the amount for which the property was purchased at foreclosure sale, with interest and costs.

Section 41-1735 provides that "if the land and water rights shall not be redeemed by any person within the times and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of the certificate of sale by the original purchaser, to issue a deed to such purchaser."

Obviously, the sheriff's deed concludes the matter and vests title absolutely and without qualification in the purchaser, whether that purchaser be the lienholder or any other person. These statutes Judge Stevens wholly overlooked and his opinion is obviously in direct conflict with the statute and that would seem to be the end of the "devastating" effect of the decision.

No one has heretofore ever suggested that the state authorities, through the state contract, can exercise any control over the land and water rights after the sheriff's deed has issued, or after the land has been patented and the water rights have become appurtenant thereto. Under the federal act the state's trusteeship extended only to the completion of the irrigation works and the sale of the unpatented land to qualified entrymen in tracts not exceeding 160 acres.

Judge Stevens further comments on the fact that unless the Carey Act lien, under Section 41-1726, be held to be superior to attachment liens and other liens and executions, the construction company would have

no such security as obviously contemplated by the statute. This illustration was also used by the Supreme Court of the United States in the Portneuf-Marsh case. Both Courts overlooked the fact that Section 41-1727, set out in the appendix to our original brief, provides that the contract for the sale of the water right "upon which the aforesaid lien is founded, shall be recorded in the office of the county recorder of the county where the said land is situated." This gives the holder of the construction lien full security against all subsequent liens and other things that troubled Judge Stevens and the Supreme Court of the United States, except the lien of the operating company for protecting the security.

This matter was discussed in our original brief, p. 61, and we shall not refer to the matter further at this point, for there is obviously not the slightest danger from the things that seemed so serious and important to Judge Stevens. The recording statutes furnish to the holder of the construction lien the same full and ample protection the law has for ages furnished to the holders of mortgage liens. We note also that the recording of the lien for the water right is substantially simultaneous with the entry of the land and before title is acquired by the entryman; hence, no prior lien could be created by attachment or otherwise that would endanger the lien under the water contract.

The By-Laws of the Operating Company

Counsel, on p. 5 of their brief, call attention to Section 5 of Article 10 of the By-Laws of appellant, and urge that it supports their contention here. In brief, that by-law provides that assessments for maintenance shall not be made until the land shall have been sold or contracted to be sold to entrymen, and, further, that "all assessments, maintenance and other

charges must be paid by the purchaser or *owner* of the stock and not by the Twin Falls North Side Land and Water Company, its successors or assigns."

The operating company, to begin with, was but a creature of the construction company, organized by the latter pursuant to the state contract. It had no assets; its only function was to issue stock certificates as requested by the construction company, but as its stock was issued it received nothing in return. It was devised by the parties as a convenient method for placing each entryman, at the time his entry was made, into an operating company that would function after the system had been completed—but would have no duties or assets prior thereto.

The above by-law was intended to cover two things: first, that no assessments should be levied on the stock until it had been made appurtenant to land which would be described in the stock certificate (see form of certificate, R. 23), and, second, it emphasized the fact that when made appurtenant to land, the assessments should be paid by the entryman and not by the construction company, which was not the owner of the stock but only held it as security (R. 208). That by-law was for the information of the entryman and it was not a prohibition against the construction company later becoming the owner by purchase from the entryman.

The limitations on the length of this brief will not permit us to discuss other questions urged by counsel for appellee.

Attention is again called to the fact that assessments levied by appellant fall in the class of "taxes," and such assessments and the statutes under which they are levied are subject to the same rules of construction as general taxes and the statutes under which such taxes are levied. This matter was discussed in our opening brief, pages 25, 48-50.

The law of merger applies to appellee's lien. This was discussed in our opening brief, pages 24, 50-55.

The decisions of the Idaho Supreme Court, in substance to the effect that appellant's lien is subordinate only to the lien of general taxes and is superior to the Carey Act lien and other liens, are in point and they are not dicta as claimed by counsel for appellee. An examination of the cases cited in our opening brief, pages 55 to 65, on this point, is a sufficient answer to appellee's argument.

For the reasons urged in our assignment of errors and in the opening brief and in this brief reply, we respectfully submit that the decree and findings be vacated and set aside and the cause remanded with appropriate instructions.

Respectfully submitted,

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